

submitted post-hearing briefs. Having reviewed the parties' submissions and the entire record of the proceedings, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

A. Introductory Findings

1. The Respondent, Garry Muratore, is the sole shareholder, officer, and director of Mickey M. Associates, a Massachusetts domestic corporation, which conducted business as Sal's Pizza, located in the town of Sturbridge. (Exhibit A, Testimony of Respondent)
2. Mickey M. Associates was established for the sole purpose of operating a Sal's Pizza franchise. (Testimony of Respondent)
3. Sal's Pizza began doing business around 2010 and ceased doing business sometime in early 2014. The business employed approximately ten employees at any given time and was an employer within the meaning of M.G.L. c. 151B, § 1(5). (Testimony of Respondent)
4. The Franchisor is also known as Sal's Pizza and its corporate office is located in Lawrence, Massachusetts. Employees of the franchisor's corporate office conducted regular oversight visits to the Respondent's franchise location to make sure that the franchisee was compliant with franchise policies and procedures. The Regional Manager, Chris Smith, conducted this oversight. He visited the franchise location twice a month for approximately two to three hours. (Testimony of Respondent)
5. Mr. Muratore has owned several business entities and has employed and overseen more than 100 employees of various ethnic backgrounds. (Testimony of Respondent)
6. At all times relevant to this matter, Mr. Muratore owned and operated other businesses. Since Mr. Muratore had other businesses to attend to, in addition to Sal's Pizza, he

typically only spent a couple of hours a day at Sal's Pizza between 12:00 PM and 2:00 PM. (Testimony of Complainant, Testimony of Respondent, Testimony of Ms. Calabresi)

7. Complainant, Emerline Martin, resided in Ware, Massachusetts with her son, Hector, and her boyfriend, Louie¹, at the time of her employment at Sal's Pizza. Her residence was approximately a 30 minute car ride from Sal's Pizza. (Testimony of Complainant, Testimony of Respondent)
8. Complainant states that her heritage is one-fourth African American, one-fourth Cherokee Indian, and one-half Puerto Rican. (Testimony of Complainant)
9. Respondent Mr. Muratore interviewed Complainant for the position of Assistant Manager of Sal's Pizza. During the interview Complainant advised Mr. Muratore that she had completed a manager training program at the Sal's corporate office and worked in the Chelmsford franchisee location. This information, as well as her presentation during the interview, persuaded Mr. Muratore to offer Complainant the job of Assistant Manager at the close of the interview. Complainant initially turned down this offer because she was only offered minimum wage²; however, Mr. Muratore remained interested in hiring Complainant and he contacted her again. The two parties negotiated a pay increase of \$2 an hour after a two week trial period, as long as Mr. Muratore found Complainant's work to be satisfactory. (Testimony of Complainant, Testimony of Muratore)
10. The position of Assistant Manager entailed: assisting in the management and supervision of other employees, completing shift paperwork, customer service and generally performing whatever functions needed to be done in the restaurant. (Testimony of Complainant, Testimony of Mr. Muratore)

¹ Louie's last name was never provided to the Commission and remains unknown to the Commission.

² Minimum wage in 2012 was \$8/hour.

11. Complainant started working on July 1, 2012. She completed the two week trial period satisfactorily and obtained her negotiated raise of \$10 per hour. (Testimony of Complainant, Testimony of Mr. Muratore)
12. Complainant worked full time. Complainant's shift varied, but typically she would work the afternoon shift. (Testimony of Complainant)
13. At the time of Complainant's hire, Chris Fulginiti was the Manager of Sal's Pizza and in addition to Mr. Muratore was her direct supervisor. (Testimony of Respondent, Testimony of Complainant)
14. During the interview process, Complainant explained to Respondent that she did not drive, but that her live-in boyfriend, Louie, had a car and that he would provide her transportation to and from work. (Testimony of Respondent, Testimony of Complainant)
15. Shortly after beginning her employment at Sal's Pizza, Complainant advised Mr. Muratore that her boyfriend's car had broken down and that he would no longer be able to provide her with transportation. (Testimony of Respondent, Testimony of Complainant)
16. Complainant relied on others for rides to work, and would sometimes ask friends or other people for rides, including Mr. Muratore. (Testimony of Respondent, Testimony of Complainant)
17. Complainant testified that her neighbor and friend, Deborah Goutay, was one of the people she would ask to give her rides to and/or from work. Ms. Goutay testified that she never asked Complainant for money for these rides. (Testimony of Ms. Goutay)
18. Occasionally, Mr. Muratore would give Complainant a ride to work which took approximately 30 minutes. Complainant testified that during the ride they would just

“listen to music” and Mr. Muratore did not use any disparaging remarks while they were driving to work. (Testimony of Complainant)

19. After Complainant’s employment began, but before her termination, Sal’s Pizza also employed a General Manager, Karen Zeger, and another Assistant Manager, Marie Calabrese. (Testimony of Respondent)

20. After Ms. Zeger started working at Sal’s Pizza, Ms. Zeger would drive in with Mr. Muratore on the two or three days a week that she worked. Ms. Zeger testified that she would leave her car at Mr. Muratore’s house and together they would then pick up Complainant in Ware, and proceed to work. Ms. Zeger testified that she would ride in the front seat and Complainant would sit in the back seat of the car. The ride took about 30 to 45 minutes. Ms. Zeger characterized the atmosphere in the car as “generally fine” and stated that “Emi (Complainant) and Gary (Mr. Muratore) were friendly in the car.” (Testimony of Ms. Zeger)

21. Respondent testified that when it became apparent that Complainant was going to need transportation on a permanent basis he offered her the use of the business vehicle. Respondent and Complainant both testified that Respondent gave her and Louie unlimited personal use of the company vehicle. (Testimony of Mr. Muratore, Testimony of Complainant)

22. Ms. Calabrese testified that all employees had her phone number and could contact her even outside of business hours. She also testified that Complainant was aware that she often gave other employees rides to and from work, but that Complainant never asked her for a ride to or from work. (Testimony of Ms. Calabrese)

23. During her employment at Sal’s Pizza, Complainant encouraged both her neighbor, Fred Hasselman and her boyfriend, Louie, to seek jobs at Sal’s Pizza. Upon Complainant’s

recommendation, Mr. Muratore hired both individuals. Louie started working for Sal's Pizza as a pizza delivery driver approximately half way through Complainant's employment there. (Testimony of Mr. Muratore , Testimony of Complainant)

24. There was evidence that on many occasions Mr. Muratore was extremely accommodating to Complainant. Mr. Muratore would wait until Complainant provided him with the hours that she was available to work before making the next week's schedule to try to accommodate her needs; he often drove Complainant to and from work; he allowed Complainant and her boyfriend the use of the company vehicle free of charge; he provided Complainant decorations for her son's birthday party; and he advanced Complainant's paycheck a couple of times a month. (Testimony of Mr. Muratore, Testimony of Complainant, Exhibit N)

25. On or About September 21, 2012, Complainant quit her employment at Sal's Pizza, but came back to work approximately a week later. (Testimony of Complainant, Testimony of Mr. Muratore , Exhibit N)

26. Complainant testified that she gave Respondent two-week notice in writing that she was quitting.³ She could not remember exactly what the notice said, but she testified that the notice did not claim she was quitting because of Mr. Muratore's racist comments. (Testimony of Complainant)

27. Mr. Muratore testified that Complainant quit in response to him reprimanding her for not following proper procedure while preparing food.⁴ (Testimony of Mr. Muratore)

³ It is unclear if Complainant actually gave Respondent a two week notice that she was quitting as other evidence presented at the hearing indicates that she quit on Friday, September 21, 2012, gave the manager, Chris Fuliginiti, her keys to the restaurant at that time, and that Mr. Muratore was made aware that Complainant had quit on September 22, 2012, while he was trying to make a schedule for the following week. (Exhibit N)

⁴ Respondent testified that on the day in question Complainant was in the kitchen preparing a French fry order. When he passed her he noticed that the order was much larger than it should be and questioned her about it. He asked her if she weighed the French fries, as was the proper procedure. When she did not respond to his question several times he yelled at her. (Testimony of Respondent)

28. Shortly after she resigned, Mr. Muratore and Complainant had a conversation during which Complainant said “Forget it, I’m coming back.” Again, Complainant did not discuss Mr. Muratore’s alleged racist comments with him at that time, nor did she request that he stop making racial comments or indicate that she was troubled by any such comments. She testified that she did not discuss this with him because “he was not someone you could have a heart to heart with.” (Testimony of Complainant)
29. Complainant was terminated from her employment at Sal’s Pizza on or about November 26, 2012 for poor performance, for stealing and for other, unprofessional behavior, as discussed below. (Testimony of Complainant, Testimony of Mr. Muratore)
30. Complainant did not work for a few months after she was terminated from Sal’s Pizza. Eventually she started working for a small independently owned pizza shop part time. She later started working at Pride Gas as an overnight clerk, making \$12 an hour, and was eventually promoted to management, where earned \$15 an hour. She stayed at this job until she was injured in a car accident. (Testimony of Complainant)
31. At the time of the hearing, Complainant was not employed. She had been receiving Social Security Disability (“SSDI”) benefits for over a year due to depression and back problems caused by a car accident which occurred approximately a year prior to the hearing on this matter. (Testimony of Complainant)

B. Hostile Work Environment Claim

32. Complainant’s initial complaint filed with the Commission stated that shortly after her employment at Sal’s Pizza began, Mr. Muratore asked her about her ethnic background. In response, she advised him that she was part African-American, part Puerto Rican, and

part Cherokee Indian. She claimed that on the following Monday, on or about July 16, 2012, he began to call her “his little half-breed” or “his little half-breed bitch, ” stating that he used this term every day, nearly every time he talked to her, and when he introduced her to other people. The complaint alleged that these terms upset her terribly but that she had to endure them because she needed to keep her job. (MCAD Complaint)

33. At the hearing, Complainant testified that she believed Mr. Muratore first inquired about her ethnic background during the interview but she was not sure. She testified that she also had a conversation with Respondent about her ethnicity early on in her employment at Sal’s Pizza but could not remember when. She stated that after this conversation, he called her a “half-breed” and thereafter called her “half-breed,” “half-breed nigger,” and “half-breed nigger bitch,” on a regular basis.⁵ She stated that early on in her employment these racial epithets were used by Mr. Muratore sparingly but they increased in frequency in the latter part of her employment. She claimed that Mr. Muratore called her one of these racial epithets five to ten times a day in front of other employees and in front of customers; that everyone heard him refer to her this way; that everyone there was aware of his use of these slurs; and that, “it was not a secret.” (Testimony of Complainant)

34. Complainant testified that she told Mr. Muratore to stop calling her racially based nicknames but he would not stop. She testified that on one occasion when she told him to stop he reached into a hot dish, picked out a meatball, popped it in his mouth and laughed at her. I do not credit Complainant’s testimony regarding this issue as she later testified that she did not talk to him about these racial comments when she quit, or when she returned to Sal’s Pizza in September of 2012 because “he was not someone you could have a heart to heart with.” (Testimony of Complainant)

⁵ It is of note that there was no mention of Respondent using the term “nigger” in the complaint. It was not until 2016 when Complainant added this term to her accusations.

35. Complainant also testified that because of Respondent's name calling, the other employees, including those that she was in charge of supervising, lost respect for her. (Testimony of Complainant) I do not credit Complainant's testimony regarding this issue.
36. Mr. Muratore testified that the first time he became aware of Complainant's ethnicity was during a conversation with her and other employees while standing around a prep-table. Mr. Muratore admitted that on this occasion, when he asked about her ethnicity, he called her a "half-breed." He stated that he said this in response to how Complainant responded to his question about her ethnicity, replying, "I'm half African American, half Puerto Rican, and half American Indian." Mr. Muratore testified that he found her statement funny as one cannot be three halves of something. He stated that he responded by asking her, "So I guess that makes you a half-breed?" joking about the inconsistency. He testified that this comment was supposed to be a joke about the math and had nothing to do with her specific heritage. He stated that he would not have said it if he had known she would perceive his comment as offensive. Mr. Muratore testified that Complainant "smiled at" his comment and it never came up again. He further testified that had her response been "half Italian, half Irish and half Mexican" he would have made the same statement. He believed that this conversation happened sometime around the "middle of her employment" because he knew her well enough by then to feel he could make a joke. He testified that this was the only time he used this term and that Complainant never told him the comment bothered her. No other witnesses testified that they were present during this conversation. (Testimony of Mr. Muratore, Testimony of Ms. Boucher, Testimony of Ms. Calebrese) I credit Mr. Muratore's testimony in this matter as he seemed sincere and the admission is contrary to his own interest.

37. Complainant testified that the General Manager, Karen Zeger, and the other Assistant Manager, Marie Calabrese, knew about Respondent's racial comments. She testified that she expressed her feeling of not being okay with these comments to them and that she "made [Ms. Zeger] aware" that the comments upset her. Complainant did not explain how or when she made Ms. Zeger aware that Mr. Muratore's comments upset her. Complainant's testimony was contradicted by the testimony of Ms. Zeger and Ms. Calabrese, both of whom testified that they were not aware of any racial epithets by Mr. Muratore, and had not been advised by the Complainant that she was distraught about comments he made. (Testimony of Complainant, Testimony of Ms. Zeger, Testimony of Ms. Calabrese) I credit Ms. Zeger and Ms. Calabrese's testimony regarding this issue over the testimony of Complainant.

38. Ms. Zeger started working for Respondent at Sal's Pizza sometime in September of 2012. Although Complainant indicated that the frequency of the name calling was at its worst during this time frame, Ms. Zeger testified that she never heard Respondent use one of the above referenced terms, nor had Complainant ever indicated to her that she was being called these names. This directly contradicts Complainant's testimony that Mr. Muratore used these terms every day, every time he talked to her, between five and ten times a day, in the presence of other employees. Ms. Zeger testified that Complainant's demeanor at work for the most part "was upbeat, she would often be singing while she was working." She only saw Complainant visibly upset at work once, when Complainant's son was sick. (Testimony of Ms. Zeger) I credit Ms. Zeger's testimony regarding this issue as she seemed sincere, and her testimony was consistent and straightforward.⁶

⁶ Although Ms. Zeger testified that she has known Mr. Muratore for over fifteen years. This was a relationship through his wife with sporadic interaction. I find that this relationship did not alter Ms. Zeger's testimony.

39. Ms. Calabrese was also employed at Sal's Pizza in the fall of 2012, around the same time that Complainant claims the name-calling was happening five to ten times a day. Ms. Calabrese testified that she never observed Respondent using any racially derogatory terms with Complainant or any other employee. Ms. Calabrese testified that Complainant "seemed happy" at work. Ms. Calabrese testified that Complainant appeared to her to be "generally a happy person" who "would be whistling away while she was working, cleaning, or whatever." Moreover, when Ms. Calabrese started working for Respondent, Complainant told her, "she liked her job very much," that Calabrese "would love it there," and that "it feels like family." (Testimony of Ms. Calabrese)

40. Tanya Boucher was hired by Respondent on or about September 24, 2012, at the time that Complainant indicated the name-calling was happening on a daily basis. Ms. Boucher testified that her heritage is Native American, Polish, and Italian. She stated that she is sensitive to racial epithets not only because of her own background but also because she has two children who are part African American. Ms. Boucher testified that she never observed or heard Respondent use the term "half breed" or "half breed nigger" in regards to Complainant or at all. She testified that if she had heard any such names being used or was told about it, she would have been particularly offended based on her own heritage and that of her children. Ms. Boucher testified that Complainant told her she felt like she was being "treated like a nigger," but Boucher never heard Respondent call her that. (Testimony of Ms. Boucher) I do not credit Ms. Boucher's testimony regarding these racial epithets due to the Ms. Boucher's contradictory statements in two opposing affidavits, as well as contradictory statement about what Complainant told her

about Mr. Muratore's use of these terms.⁷ It is clear that this witness has a faulty memory and is unreliable.

41. Complainant testified that when she was previously employed by the franchisor of Sal's Pizza at the corporate headquarters, she participated in the management program and was required to attend discrimination training. She further testified that she found it boring and fell asleep. (Testimony of Complainant)

42. Complainant testified that she never notified anyone at the franchisor's corporate headquarters about the treatment she was experiencing at Sal's Pizza because "there was no one to complain to above Mr. Muratore because he was the owner and the manger." (Testimony of Complainant) I do not credit Complainant's testimony regarding this issue since Complainant had completed training at corporate headquarters while attending the management program, was aware of the franchisor's continued oversight of the franchisee, and had access to the regional manager twice a month when he was conducting regular inspections of the franchisee. It is also of note that Complainant was hired as an Assistant Manager and completed management training at the corporate office, which included discrimination prevention training for managers.

⁷ Ms. Boucher signed an affidavit on March 3, 2013 on behalf of Respondent. She testified that although she discussed the information contained in the affidavit with Mr. Muratore, he typed the affidavit and had her sign it. She also believed the affidavit that she signed was only one page; however, the affidavit marked as Exhibit E is two pages. Ms. Boucher signed a second affidavit and statement on August 23, 2016 on behalf of Complainant. Ms. Boucher testified that she was nervous when a private investigator working on behalf of Complainant's attorney showed up at her home unannounced because she thought "he was from the State." She stated that she had some past negative interactions with representatives from a state agency which created anxiety around this encounter. She was also confused as to how many times the private investigator came to her home and was confused about the content of their interactions. She did not remember going over the second affidavit or statement and signing but admits that it is her signature and initials on the two documents, and her license number on the notary stamp. The private investigator, Mr. Winstanley, testified that he visited Ms. Boucher twice. During the first visit they went over the March 3, 2013 affidavit and he took notes to create a new affidavit that he typed up. He returned on August 23, 2016 with the typed affidavit for her signature. In the first affidavit, Ms. Boucher stated that she never heard Mr. Muratore refer to Complainant or call her a "half-breed" or "his little half-breed bitch" or any other derogatory names and that she never heard Mr. Muratore make any derogatory statements about anyone's race or ethnicity; however, in her statement attached to the second affidavit she states that she did hear Mr. Muratore use derogatory language towards Complainant including calling her "half-breed" and "nigger." (Testimony of Mr. Winstanley, Testimony of Ms. Boucher, Ex. B, Ex. C, Ex. D, Ex. E, Ex. I, Ex. J, Ex. K, Ex. L)

43. The Complaint states that Respondent used the terms “half breed,” “half breed bitch,” “half-breed nigger,” and “half-breed nigger bitch” every day and nearly every time he talked to her or referred to her to other people. She testified that he made these remarks everywhere in the store in the presence of other employees and customers. Complainant testified that Mr. Muratore used these terms with increasing frequency throughout her employment at Sal’s Pizza and in the last few months as much as five to ten times a night. However, she also testified that Respondent never used these terms in front of her boyfriend, Louie, who also worked at Sal’s Pizza during the time she claims the frequency of incidents was the highest. (Testimony of Complainant) I do not credit Complainant’s testimony regarding this issue as her statements seemed exaggerated, self-serving, contradictory, and insincere. Furthermore, not only was her testimony regarding the harassing behavior incongruous with evidence regarding her other interactions with Mr. Muratore,⁸ but she was unable to present any witnesses who heard Mr. Muratore use these derogatory terms despite her claims that they were a daily and frequent occurrence.
44. Ms. Zeger and Ms. Boucher testified that Mr. Muratore was a yeller, but that he never used derogatory names. Mr. Muratore admitted that he would sometimes yell and curse, but denied using derogatory terms when yelling at his employees. Respondent testified that he is “generally a loud person, whether angry or just talking on the phone.”
- (Testimony of Mr. Muratore, Testimony of Ms. Zeger, Testimony of Ms. Boucher)

⁸ There was ample evidence presented at the hearing of an amicable relationship between Complainant and Mr. Muratore. Ms. Zeger described Complainant’s interactions with Mr. Muratore in the car as friendly. Text messages between Complainant and Mr. Muratore are friendly in nature, including a text from Complainant to Mr. Muratore in October of 2012 where she says, “Good morning sunshine!” Mr. Muratore was extremely accommodating to Complainant. He would wait to find out Complainant’s availability to work before making the next weeks schedule to try and accommodate her needs. Mr. Muratore often drove Complainant to and from work; allowed Complainant and her boyfriend to use the company vehicle free of charge; gave Complainant decorations for her son’s birthday party; and gave her advances on her pay check a couple of times a month. (Testimony of Ms. Zeger, Testimony of Complainant, Testimony of Mr. Muratore, Exhibit N)

45. Complainant testified that because of Mr. Muratore's constant name-calling, she became so distraught that she needed to seek counseling. She also testified that at times she suffered from an eating disorder. There were times she couldn't eat and other times when she couldn't stop eating, and that the stress was causing her to lose her hair. Complainant testified that she did not seek counseling for these issues until after her discharge.

(Testimony of Complainant) I do not credit Complainant's testimony that the reason for seeking counseling was Mr. Muratore's alleged discriminatory behavior.

46. Complainant testified that during her five months of employment, her weight would "fluctuate plus or minus 20 pounds" at the same time and she was losing her hair from the anxiety around Mr. Muratore's behavior. She testified that the change was so drastic she was "sure people had to notice." However, Ms. Zeger and Ms. Calabrese both testified that they did not notice Complainant's weight gain and loss, nor did they notice Complainant's alleged hair loss. (Testimony of Complainant, Testimony of Ms. Zeger, Testimony of Ms. Calabrese) I do not credit Complainant's testimony that she developed an eating disorder or started losing her hair due to stress and anxiety caused by Mr. Muratore's alleged name calling, as these statements are uncorroborated and self-serving. Furthermore, although the Complainant states in her complaint filed with the Commission that during this time period she "had trouble sleeping" and was "angry, mad, embarrassed and emotionally distressed[,]," her complaint makes no mention of either an eating disorder or hair loss, which would normally be noted in the Complaint.

47. Ms. Goutay, Complainant's neighbor and friend, testified that Complainant confided in her about Mr. Muratore's behavior and that she observed the detrimental effects his racial epithets had on Complainant. Ms. Goutay stated that Complainant told her that Mr. Muratore called her "lazy" and told her that "she was not doing it right" and referred to

her as “half-breed” and “nigger.” She also stated that Complainant was always stressed and upset resulting in significant weight fluctuations during this time period, as well as, hair loss. (Testimony of Ms. Goutay) I do not credit Ms. Goutay’s testimony. First, Ms. Goutay had no firsthand knowledge of the racial slurs allegedly used by Mr. Muratore. Second, Ms. Goutay’s testimony seemed rehearsed and limited only to the issues of Mr. Muratore’s alleged harassment and Complainant’s purported emotional distress, and she was not aware of other things going on in Complainant’s life at the time. She testified that Complainant did not confide in her about any other issues in her life, including friendships, her relationship with her boyfriend, or other aspects of work and her subsequent job search. Ms. Goutay did not know the reason for Complainant’s termination, what actions she took to obtain substitute employment, or anything about Complainant’s personal life at the time of these allegations. Lastly, Ms. Goutay did not seem to know basic information about Complainant’s employment with Respondent, testifying that Complainant worked at a liquor store five to ten minutes from their houses during the time Complainant actually worked for Respondent at Sal’s Pizza 30 minutes from their residences despite testifying that she drove Complainant to work at Respondent. (Testimony of Goutay)

48. At the time of her one-week resignation on or about September 21, 2012, Complainant did not give notice that Mr. Muratore’s alleged racist comments were the reason she was quitting. She testified that she did not complain to Mr. Muratore about the alleged comments or discuss that that comments needed to stop either before her resignation or upon her return to work. She testified that she did not discuss this with him because “he was not someone you could have a heart to heart with.” (Testimony of Complainant)

49. In contradictory testimony, Complainant testified that she “made it clear” to Mr.

Muratore that the racial epithets made her uncomfortable; however, her testimony was very general and vague as to exactly when or what she said to him. I do not credit this testimony. (Testimony of Complainant)

50. Despite the racial animosity that Complainant alleges, the string of text messages between her and Mr. Muratore indicate that there was no animosity racial or otherwise between them. In general, the text messages were friendly in nature by both parties. (Exhibit N)

51. Despite Respondent’s willingness to accommodate Complainant’s schedule, Complainant testified that she never asked to be scheduled for hours when Mr. Muratore would not be there. (Testimony of Complainant)

52. Complainant testified that she did not quit due to Mr. Muratore’s racial comments because she needed a pay check and could not find comparable work. (Testimony of Complainant) I do not credit Complainant’s testimony as she was able to find work after she was terminated from Sal’s Pizza that paid two dollars an hour more than she was earning at Sal’s. (Testimony of Complainant)

53. Mr. Muratore testified that of the over 100 employees that Respondent has employed and supervised over the years, he has never received any other complaints about discriminatory behavior on his part. Neither have the Sal’s Pizza corporate office nor any of his business partners ever received any complaints about Mr. Muratore acting in a discriminatory manner. (Testimony of Mr. Muratore) I credit Mr. Muratore’s testimony regarding this issue.

C. Discriminatory Termination Claim

54. Complainant testified and the Complaint stated that, at all times she was a satisfactory employee, had received no disciplinary actions in regard to performance since her start date, and that she “did a good job.” (Testimony of Complainant) I do not credit Complainant’s testimony regarding this issue as it was contradicted by substantial evidence presented at the hearing, as well as, Complainant’s own testimony that Respondent would yell at her concerning her work performance and threatened to fire her “quite often.” (Testimony of Complainant)
55. Ms. Zeger and Mr. Muratore both testified that Complainant’s work performance fluctuated and was often subpar. Mr. Muratore testified that he was constantly reprimanding Complainant for failure to perform at the level of an assistant manager. He often had to reprimand her for failing to follow company policies, failing to complete certain paperwork, and failing to adhere to specification/measuring protocols when preparing food. Mr. Muratore indicated that overall there was a general decline in Complainant’s job performance. He had many discussions with her about her performance, which he admitted, at times, would progress to him yelling at her. He testified that after these discussions she would improve for a time, but she would eventually revert back to old bad habits. Mr. Muratore further testified that, despite these performance issues, he did not fire Complainant, because he liked her and thought she had the potential to be a good manager if she would just apply herself, and because he knew she needed the job. Ms. Zeger testified that in her opinion, Complainant was a “mediocre employee.” She testified that Complainant often refused to follow directions or adhere to the franchise specifications by not weighing food portions. Ms. Zeger had to discipline Complainant on several occasions for such things. Ms. Zeger also reprimanded

Complainant for leaving food out, leaving dirty dishes in the sink, and not cleaning the floor. (Testimony of Mr. Muratore, Testimony of Zeger) I credit the testimony of Ms. Zeger and Muratore as they each corroborated Complainant's deficient performance, and because there was additional corroborating evidence, including Complainant's own testimony.

56. Ms. Calabrese stated that Complainant was continually being reprimanded for neglecting to monitor how long pizzas were left out unrefrigerated, which placed the restaurant in jeopardy of code violations, and at risk of losing their franchisee license. (Testimony of Ms. Calabrese) I credit the testimony of Ms. Calabrese regarding this issue.

57. Complainant testified that she never drank on the job. However, when presented with a written warning that indicated otherwise, Complainant recanted, stating she did drink at work, but claimed that it was only one drink, one time, during her lunch break. (Testimony of Complainant) Ms. Boucher testified that she drank "nips" with Complainant while working at Sal's Pizza on several occasions. (Testimony of Ms. Boucher) Furthermore, Ms. Zeger and Ms. Calabrese heard rumors that Complainant drank on the job; although, neither of them actually observed her do so. (Testimony of Ms. Zeger, Testimony of Ms. Calabrese) I do not credit Complainant's testimony regarding this issue.

58. Complainant also received a written warning about leaving work early. Complainant said she did not recall receiving this warning but admitted that it was her signature on the written warning from November of 2012. (Testimony of Complainant)

59. Complainant testified that she was terminated on or about November 26, 2012, because according to Mr. Muratore, the "register was short about \$12." She claimed that she was not the one who took the money from the register and explained that she was not the only

person on the register. (Testimony of Complainant) I do not credit Complainant's testimony regarding this issue.

60. Respondent and Ms. Zeger testified that Complainant was not fired because the register was short \$12, but because she stole \$30 from the cash box in the office. On or about November 26, 2012, Respondent noticed that the cash box was short \$30. When Respondent noticed the shortage he checked the security surveillance tape. On the surveillance tape he noticed a discrepancy in the amount of money Complainant was taking out to the cash box, supposedly to make change for the register. After watching the tape several times, he believed that Complainant was stealing and fired her, as he would any person that was caught stealing.⁹ Mr. Muratore testified that he suspected Complainant was stealing prior to this incident but did not have proof so he continued to give her the benefit of the doubt. (Testimony of Mr. Muratore, Testimony of Ms. Zeger) I credit Respondent's testimony regarding this issue.

61. On November 27, 2012, Police Officer Larry P. Bateman, (the "Officer") was on the premises of Sal's pizza responding to a fire alarm. At Muratore's request, the Officer viewed the surveillance tape that Mr. Muratore believed showed Complainant stealing money from the cash box because he wanted to know if there was enough evidence to press charges. (Testimony of Mr. Muratore, Exhibit G)

62. The Officer stated in his report that after reviewing the tape and conducting an investigation, there was sufficient probable cause to conclude that Complainant had "in fact completed a Larceny under \$250, by unlawfully stealing with the intent to deprive the rightful owner of that property indefinitely." He subsequently submitted the paperwork for processing with the Dudley District Court. (Exhibits G and F)

⁹ Mr. Muratore testified that he would terminate any employee who was caught stealing no matter what the amount of money taken because it was indicative of an ongoing problem. (Testimony of Mr. Muratore) Ms. Zeger also testified that she had fired another employee at the behest of Mr. Muratore for stealing. (Testimony of Ms. Zeger)

63. Complainant was arraigned on February 22, 2013. At the pretrial hearing on April 4, 2013, the matter was continued without a finding to be dismissed when Complainant paid court costs and restitution in the amount of \$30. (Exhibit F)
64. On or about November 26, 2012, another incident involving Complainant came to Mr. Muratore's attention. Mr. Muratore was shown a video in which Complainant bet another employee \$50 that she could drink a gallon of marinara sauce in five minutes. The video showed Complainant, in the kitchen of Sal's Pizza, drinking sauce from a ladle and directly from the container. The employees were all standing around watching her drink the marinara sauce, yelling and commenting on how disgusting it was. At one point during the video, Complainant was chasing another employee around the kitchen. She eventually started getting ill from trying to drink the sauce and it was unclear if she in fact vomited into the container or that the others just discussed that she did. Mr. Muratore testified that he found this video disgusting and inappropriate. He stated that even if Complainant had not been caught stealing, he would have terminated her for this incident alone. (Exhibit H)
65. When Complainant was questioned about this incident at the hearing, she testified that she thought this was acceptable behavior for an Assistant Manager because the sauce was going to be thrown away, so it wasn't wasting food, and stated that the incident "was a joke," and more of a "team-building thing." She believed that going through with this bet would encourage employees to respect her and that "it was fun and we all had a good laugh." (Testimony of Complainant) I do not credit Complainant's testimony that she believed that this behavior was acceptable as the video clearly shows Complainant yelling at another employee not to video the incident and chasing after the employee to try and prevent the recording.

D. Retaliation Claim

66. The Complaint states “on or before November 26, 2012, Mr. Martore [sic] learned that I had been complaining about his comments” and that he “fired me the same day.” The Complaint further states, “After I filed a claim with the Division of Unemployment Insurance, Mr. Maratore [sic] changed his story to say that I had “stolen \$30.00 from the safe, but this is untrue.” (MCAD Complaint)
67. The Complaint asserts that once Mr. Muratore heard that she was complaining to coworkers about being called racial names, he fired her. (MCAD Complaint)
68. Ms. Boucher testified that Complainant told her that she wanted to figure out how to file a discrimination claim against Mr. Muratore. (Testimony of Ms. Boucher) As noted previously I do not credit Ms. Boucher’s testimony as it is clear that this witness has a faulty memory and is unreliable.
69. Mr. Muratore testified that Complainant’s employment with Sal’s Pizza was terminated by Respondent on or about November 26, 2012 after Mr. Muratore discovered evidence that Complainant had taken money from the stores cashbox and for inappropriate behavior while she was at work in a supervisory capacity. (Testimony of Mr. Muratore) I credit his testimony about the reasons for Complainant’s termination.
70. No evidence was presented during the hearing that Mr. Muratore was ever aware that Complainant alleged he had made racial epithets.

III. CONCLUSIONS OF LAW

Complainant alleges that Respondent violated M.G.L. c. 151B, §§ 4(1) & 4(4), by subjecting her to a racially hostile work environment and terminating her employment on account of her race and in retaliation for her complaining about racial comments made by Mr. Muratore.

A. Hostile Work Environment Claim

Pursuant to M.G.L. c. 151B, § 4(1) it is unlawful for an employer to discriminate against an individual because of race, color, national origin, or ancestry “in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.” M.G.L. c. 151B, § 4(1) “has been interpreted to provide a cause of action for hostile work environment based on the cumulative effect of a series of abusive acts even though each act in isolation might not be actionable in itself. Windross v. Village Automotive Group, Inc., 71 Mass. App. Ct. 861, 863 (2008).

In order to establish a prima facie case of racial harassment that creates a hostile work environment, Complainant must establish that 1) she was a member of a protected class; 2) that she was the target of speech or conduct based on her membership in that class; 3) that the speech or conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment; and 4) that the harassment was perpetrated by a manager or supervisor, or there is proof that Respondent knew or should have known of the harassment and failed to take prompt remedial action. See Lattimore v. Polaroid Corp., 99 F.3d 456, 463 (1st Cir. 1996); Sims v. Glass Slipper Gentlemen’s Club, 37 MDLR 43 (2015); citing College-Town, Division of Interco v. Massachusetts Comm’n Against Discrimination, 400 Mass. 156, 162

(1987); Beldo v. University of Massachusetts Boston, 20 MDLR 105 (1998); Vance v. Southern Bell Tel. & Tel.Co., 863 F.2d 1503, 1511-1515, 463 (11th Cir. 1989).

The first prong of this analysis is undisputed. Complainant part Puerto Rican, African American, and Cherokee Indian, thus making her a member of a protected class. The fourth prong is also undisputed, as Mr. Muratore was the owner/operator and was Complainant's supervisor at Sal's Pizza during her employment.

In support of prongs two and three of the prima facie case, Complainant claims that Mr. Muratore subjected her to racial harassment, by repeatedly calling her a "half-breed," a "half-breed bitch," a "half-breed nigger," and a "half-breed nigger bitch." She further alleges that this name-calling occurred on a daily basis, approximately five to ten times a day and in the presence of co-workers and customers and that others were aware of the racial comments. She alleges that this repeated use of racially charged epithets was so severe and pervasive that it caused her stress and anxiety triggering significant weight fluctuations and hair loss.

Respondent admits to referring to Complainant as a "half-breed" on one occasion as a joke in response her statement that she was "half African American, half Puerto Rican, and half American Indian." He stated that this was a one-time, light-hearted, comment made because Complainant stated she was three halves of something. Mr. Muratore denies that he called Complainant "half-breed," "half-breed bitch," "half-breed nigger," and "half-breed nigger bitch" at any other time. He absolutely denied ever using racial epithets and other employees testified they never heard him use such language.

Despite the allegation that this conduct occurred on a daily basis, many times a day in front of other employees and customers, Complainant was unable to produce a single witness to corroborate her testimony that Mr. Muratore used this racially derogatory language. All of the witnesses who testified, except one, denied ever hearing any such language or in reference to

Complainant. The only evidence Complainant produced to corroborate her allegations were a statement attached to an affidavit signed by Ms. Boucher in 2016, which stated that she did hear Mr. Muratore use derogatory language towards Complainant including calling her “half-breed” and “nigger” and the testimony of Ms. Goutay, a neighbor/friend, who merely relayed that Complainant confided in her about the harassment, but had no direct knowledge of the allegations. I did not find either of these witnesses credible. The testimony of both these witnesses was contradictory or confusing and therefore, unreliable. Ms. Boucher signed two contradictory affidavits, neither of which she personally wrote. Although Ms. Boucher did state that she heard Mr. Muratore use derogatory language towards Complainant in the second affidavit; in the first affidavit Ms. Boucher stated that she never heard Mr. Muratore refer to Complainant or call her a “half-breed,” “his little half-breed bitch,” or any other derogatory names and she never heard Mr. Muratore make any derogatory statements about anyone’s race or ethnicity. Furthermore, at the hearing, she once again contradicted statements made in both of these affidavits. At the hearing, Ms. Boucher presented as confused and clearly had a faulty memory regarding salient facts. When questioned about the affidavits she signed, significant inconsistencies were revealed. She stated that the first affidavit that she signed was only one page; however, the original affidavit entered into evidence was two pages and she confirmed that it was her signature on the affidavit. She also stated that she did not remember reviewing or signing the second affidavit and statement but confirmed her signature on the affidavit and her license number on the notary stamp. At the hearing, Ms. Boucher denied ever hearing Respondent use any racially derogatory language. Ms. Goutay on the other hand merely stated that Complainant told her of the allegations that Respondent called her a “half-breed” and a “nigger.” She corroborated Complainant’s assertions that Complainant was always stressed and upset, suffered significant fluctuations in her weight and hair loss during this time period.

However, Ms. Goutay had no firsthand knowledge of the allegations of racial slurs and her testimony came across as rehearsed and limited only to what Complainant told her and the purported effects on Complainant. She was clearly confused about where Complainant worked at the time of the alleged harassment.

Respondent on the other hand produced two witnesses who worked with Mr. Muratore and Complainant during the time of the alleged conduct, both of whom denied ever hearing Mr. Muratore call Complainant any of the names she alleged. Neither witness had ever heard Mr. Muratore use any racially derogatory language during their employment or any other interactions with him outside of work. Both witnesses also stated that Complainant never talked to them about Mr. Muratore's alleged harassing behavior and that Complainant seemed happy and upbeat while at work. Furthermore, not only did the evidence show that Complainant did not notify the General Manager or the other Assistant Manager about the harassing behavior, she admitted that she did not notify anyone at the franchisor's corporate office despite the Regional Manager's presence at her location twice a month.

Respondent's denial of these accusations is also substantiated by evidence of an amicable relationship between the two parties, which would be inconsistent with the alleged harassing behavior. It is undisputed that Mr. Muratore would often drive Complainant to and from work; allowed Complainant and her boyfriend to use the company vehicle free of charge; provided Complainant decorations for her son's birthday party; and gave Complainant advances in her pay check a couple of times a month. There is also evidence of a text Complainant sent to Mr. Muratore during the alleged height of this harassing behavior, saying "Good morning sunshine!" There was also significant evidence that Complainant enjoyed working for Mr. Muratore at Sal's Pizza. She told Ms. Calabrese, "she liked her job very much," that Ms. Calabrese "would love it there," and that "it feels like family." She also encouraged both her neighbor and her boyfriend

to seek employment with Respondent, which is inconsistent with a person who was being harassed on a daily basis and is gravely upset about the harassment.

It is also of note that there were numerous inconsistencies between the allegations Complainant put forth in her MCAD Complaint and the allegations that she testified to at the hearing. Complainant stated in the MCAD Complaint that Respondent called her “his little half-breed” or “his little half-breed bitch,” but at the time of the hearing Complainant stated that he also called her “half-breed nigger” and “half-breed nigger bitch.” The Complainant also testified that she experienced weight fluctuations and hair loss caused by her stress and anxiety, even though these afflictions were not mentioned in the MCAD Complaint and were not noted by any of her coworkers. These inconsistencies are of note because they are significant facts, going to the heart of the complaint, that, if true, would likely not have been omitted from the MCAD Complaint.

A hostile work environment is “based on the cumulative effect of a series of abusive acts” that an objectively reasonable person would find “severe and pervasive.” Windross v. Village Automotive Group, Inc., 71 Mass.App.Ct. 861, 863, 869 (2008). Based on all of the evidence presented, I do not credit Complainant’s assertion that she was subjected to continuous racial epithets or that Mr. Muratore ever used the word “nigger.” Although Respondent admitted to calling Complainant a “half-breed” on one occasion, this incident appears to have been a one-time stray remark, and a casual comment meant as a joke. It is insufficient to create a hostile work environment as the comments themselves were not severe nor were pervasive. Her claims that these racial epithets were a daily occurrence are unsubstantiated by the record. Instead, there is ample evidence that she and Mr. Muratore had an amicable and friendly relationship and that he extended her many favors including rides to work, use of the company car, accommodations to her schedule, and advances on her pay.

For the reasons set forth above, I find that Complainant has not established that she was the target of speech or conduct based on her membership in a protected class or that the speech or conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive and hostile working environment; therefore Respondent is not in violation of M.G.L. c. 151B, § 4(1)

B. Discriminatory Termination Claim

M.G.L. c. 151B, § 4(1) prohibits an employer from discharging an individual from employment based on race, color, national origin, or ancestry. In order to establish a prima facie case of discriminatory termination, Complainant must establish that: (1) she is a member of a protected class; (2) she was performing her position in a satisfactory manner; (3) she suffered an adverse employment action; and (4) similarly-situated persons not of her protected class were not treated in a like manner. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wheelock College v. MCAD, 371 Mass 130 (1976).

Once Complainant has established a prima facie case of discriminatory termination, the burden of production shifts to Respondent to articulate legitimate, non-discriminatory reasons for its actions. Abramian v. President and Fellows of Harvard College, 432 Mass 107(2000); Wheelock College v. MCAD, 371 Mass. 130 136 (1976); Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass 437 (1995). Once Respondent has articulated legitimate, non-discriminatory reasons for their conduct, Complainant must show that Respondent's reasons are a pretext for unlawful discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

The first and third prongs of this analysis are undisputed, as Complainant is a member of a protected class and she was terminated from her employment.

In support of prongs two and four of the prima facie case, Complainant claims that at all times she was a satisfactory employee, received no disciplinary actions in regard to her performance, and “did a good job.” She claimed that she was terminated on or about November 26, 2012, because the register was short \$12 and that she was blamed for the shortage even though she was not the only person on the register. However, the overwhelming evidence presented at this hearing contradicts all of these assertions.

The evidence presented at this hearing indicated that Complainant was not performing her position in a satisfactory manner. Ms. Zeger and Mr. Muratore testified that Complainant’s work performance fluctuated, was often subpar, and was on a general decline over the last few months of her employment. They often had to reprimand her for failing to follow company policies, failing to complete certain paperwork, failing to adhere to specifications/measuring protocols when preparing food, and failing to clean up properly. Complainant’s own testimony established that Respondent would yell at her about poor work performance, that Mr. Muratore threatened to fire her, and that she had received, at least, two written warnings about her behavior prior to her termination.

There was also evidence that Complainant was drinking while at work. Although Complainant only admits to drinking at work on one occasion for which she received a written warning, Ms. Boucher testified that she would drink nips with Complainant while working. I found Complainant’s testimony regarding this issue self-serving and untrustworthy as she only admitted to drinking on the job when her testimony was proven false. The evidence does not support Complainant’s assertions that she was performing her position in a satisfactory manner.

Furthermore, the evidence clearly shows that on or about November 26, 2012, Respondent reviewed security surveillance tape indicating that Complainant stole \$30 from the cashbox. Mr. Muratore fired her, as he would any person that was caught stealing, and subsequently filed a complaint with the police. The police found probable cause and Complainant was charged with Larceny under \$250. It is also clear that Complainant knew that she was discharged because she stole \$30 from the cashbox and not because there was a \$12 shortage in the register, as she was interviewed by the police regarding this theft the following day.

Mr. Muratore was also advised on or about November 26, 2012, that Complainant had recently bet another employee \$50 that she could drink a gallon of marinara sauce and was shown a video of this incident. Mr. Muratore found this video inappropriate and disgusting and unprofessional for an Assistant Manager. He asserted that this behavior, alone, would have been grounds for termination. Complainant admitted to the facts of this incident but she thought this was acceptable behavior for an Assistant Manager. She did not see anything wrong with what she had done and claimed that it was more of a "team-building thing." I did not credit Complainant's testimony that she thought this behavior was acceptable; however, her belief that this behavior is acceptable only highlights her immaturity, undermines her authority to be a manager, and shows her inability to understand the requirements of her position as an Assistant Manager.

After reviewing the evidence, it is clear that Complainant has not established a prima facie case of discriminatory termination. She has not shown that she was a satisfactory employee and has presented no evidence that her termination was based on her race or ethnicity. Even if we assume that Complainant established a prima facie case for discriminatory termination, Respondent articulated two legitimate reasons for terminating Complainant's employment. First,

there enough evidence for Respondent to conclude that Complainant had stolen \$30, evidence that was sufficient to establish probable cause for Complainant to be charged and arraigned for this offense. Furthermore, evidence came to light at that time that Complainant was not acting appropriately as a supervisor and was in fact, instigating inappropriate and unprofessional behavior while in the kitchen with numerous employees present. Her unprofessional conduct, alone, would have been a sufficient reason for termination. Complainant did not present any evidence that these reasons for termination were pre-textual.

For the reasons set forth above, I find that Complainant has not established she was performing her position in a satisfactory manner or that she was terminated under circumstances that gave rise to a reasonable inference of discrimination based on race or ethnicity; therefore Respondent is not in violation of M.G.L. c. 151B, § 4(1).

C. Retaliation Claim

Pursuant to M.G.L. c. 151B, § 4(4), it is unlawful “for any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because [s]he has opposed any practices forbidden under this chapter or because [s]he has filed a complaint, testified or assisted in any proceeding under section five.” Complainant has alleged that Respondent terminated her employment in retaliation for her complaints about the racially hostile environment Respondent’s racial epithets created.

In order to establish a prima facie case of retaliation, Complainant must show that 1) she engaged in protected activity; 2) Respondent was aware of the protected activity; 3) Respondent subjected her to an adverse action, and 4) that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003).

If Complainant establishes a prima facie case, Respondent may show that legitimate, non-discriminatory reasons exist for the adverse action. Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 128 (1997). If Respondent succeeds in offering such reasons, Complainant must then show that Respondent's reasons are pre-textual. Id.

Complainant alleges she engaged in protected activity by inquiring of other employees how to file a complaint against Mr. Muratore. Mr. Muratore testified that he was unaware that Complainant was seeking advice on how to file a discrimination claim and no evidence was presented at the hearing that he was ever aware that Complainant had been complaining about any alleged racial epithets.

It is undisputed that Complainant was subjected to an adverse action, as her employment with Sal's Pizza was terminated on or about November 26, 2012. However, Complainant has presented no evidence to establish that Respondent was aware of any protected activity complainant might have been involved in or that a causal connection existed between her protected activity and her termination.

Ms. Boucher testified that Complainant said to her that she wanted to figure out how to file a discrimination claim against Mr. Muratore; however, I did not find this witness credible. Her memory was faulty; she contradicted herself numerous times; and she was highly unreliable. No other witnesses corroborated Complainant's claims that she complained about an unwelcome racially hostile environment or that she intended to file a claim for discrimination. Even if it is taken at face value that Complainant told Ms. Boucher that she wanted to figure out how to file a discrimination claim against Mr. Muratore, there was no evidence presented that Mr. Muratore was ever aware of this fact.

Furthermore, there was no evidence presented that there was a causal connection between any supposed complaints and her termination. Respondent presented legitimate non-retaliatory

reasons for Complainant's termination. As previously noted, Respondent articulated two legitimate reasons for terminating Complainant's employment: Complainant had stolen from the company and he learned that Complainant was acting in an inappropriate, disgusting, and unprofessional manner while serving in a supervisory position in the kitchen. Complainant did not present any evidence that these reasons for termination were pre-textual.

For the reasons set forth above, I find that Complainant has not established a prima facie case for retaliation; therefore Respondent is not in violation of M.G.L. c. 151B, § 4(4).

IV. ORDER

For the reasons set forth above, the Complaint is dismissed.

This constitutes the final order of the Hearing Commissioner. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 24th day of November, 2019


SUNILA THOMAS GEORGE,
Hearing Commissioner